In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1276

GERARDO A. RE a/k/a JERRY A. RE and GERARD F. RE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 372 F. 2d 641.

JURISDICTION

The judgment of the court of appeals was entered on February 6, 1967. A petition for rehearing was denied on March 16, 1967. The petition for a writ of certiorari was filed on April 15, 1967. The juris-

diction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioners' motion under 28 U.S.C. 2255 was properly denied without a hearing.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted (with others) of conspiracy to violate the Securities Acts and of selling unregistered shares. On September 10, 1963, they were sentenced to six months' imprisonment, to be followed by a period of three years' probation; each was also fined $15,000. The court of appeals affirmed. 336 F. 2d 306 (C.A. 2), certiorari denied, 379 U.S. 904.

The evidence, which is not in issue here, is set forth in some detail in the opinion of the court of appeals, 336 F. 2d at 309-311. It showed that in 1954 one Birrell, a co-defendant who was separately tried, gained control of a company named Swan-Finch. Birrell granted petitioners an option to buy shares of Swan-Finch and shortly thereafter petitioners became market specialists in that security, which was traded on the American Stock Exchange. Through stock splits and corporate acquisitions the total amount of Swan-Finch stock was increased from 34,794 shares to 2,800,000 shares, none of which was ever registered with the SEC. Petitioners manipulated the market in Swan-Finch for Birrell by selling

and buying large quantities of Swan-Finch stock through accounts which they controlled in the names of various persons. They were compensated by Birrell for these services.

In 1966 petitioners moved in the district court under 28 U.S.C. 2255 to have their convictions set aside [1] on the ground that various of Birrell's records relating to Swan-Finch had been illegally seized and introduced at their trial. They also alleged that they had been excluded, in violation of their constitutional rights, from a hearing held in the judge's chambers during the trial to determine whether their former counsel, Mr. Milton Gould, who also represented one of the government's witnesses at the trial, had been guilty of any impropriety which might have prejudiced their defense. The district court denied the motion without a hearing and the court of appeals affirmed (Pet. App. A).

ARGUMENT

1. Petitioners' contention that records of Birrell relating to Swan-Finch should not have been introduced at their trial rests on the fact that, at a subsequent trial of Birrell alone, the district court held that as to him the seizure of those records had violated the Fourth Amendment. *United States* v. *Birrell*, 242 F. Supp. 191 (S.D.N.Y.); see also *United*

[1] Petitioners denominated their action as one under the All-Writs statute, 28 U.S.C. 1651, but the courts below properly treated it as a motion under 28 U.S.C. 2255, since petitioners, who are serving their sentence of probation, are still in federal custody. See *Jones* v. *Cunningham*, 371 U.S. 236.

States v. *Birrell*, 243 F. Supp. 36 (S.D.N.Y.). It is clear, however, that petitioners, who were not on the premises at the time of the seizure and who had no proprietary interest in the documents taken, are without standing to contest the seizure. *Wong Sun* v. *United States*, 371 U.S. 471, 491-492; *Jones* v. *United States*, 362 U.S. 257, 261. Moreover, as the court of appeals noted (Pet. App. 21), petitioners were aware at trial of the circumstances under which the records had been seized but made no motion to suppress the evidence. In these circumstances they may not raise the contention for the first time in a collateral proceeding under 28 U.S.C. 2255. See, *e.g.*, *Thornton* v. *United States*, 368 F. 2d 822 (C.A.D.C.); *United States* v. *Walker*, 197 F. 2d 287 (C.A. 2), certiorari denied, 344 U.S. 877.[2]

2. At petitioners' trial a hearing was held in the judge's chambers to determine whether petitioners' former lawyer, Mr. Gould, who also represented one Birnbaum, a government witness at the trial, had committed any misconduct, with respect to the disclosure of privileged information to Birnbaum, which might have prejudiced petitioners. The hearing was requested after the government introduced a photostat of a letter, obtained from Mr. Gould's firm, from

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[2] It is thus unnecessary to reach the question whether a Fourth Amendment search-and-seizure claim is cognizable at all on a Section 2255 motion. Compare *Kapsalis* v. *United States*, 345 F. 2d 392 (C.A. 7), certiorari denied, 382 U.S. 946, with *Gaitan* v. *United States*, 317 F. 2d 494, 496 (C.A. 10) (dictum). See generally, Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. Pa. L. Rev. 378 (1964).

one of the co-defendants to Birnbaum (Br. App. 53a).[3] Counsel for petitioners, but not petitioners themselves, was present at the hearing, at which Mr. Gould (referred to as "Z" in the transcript) testified (Br. App. 82a, 85a). The evidence he gave showed that Birnbaum's company was a long-time client of the law firm of which he was a partner and that he had represented the company in an action in 1956 to enjoin violations of the Securities Act with regard to Swan-Finch. In that litigation petitioners had been represented by other counsel (Br. App. 86a-87a, 102a). In 1961 petitioners retained Mr. Gould in connection with hearings before the SEC relating to the revocation of their broker-dealer license. Mr. Gould disclosed to petitioners at that time that he represented Birnbaum but said he saw no conflict (Br. App. 89a-92a, 100a). Subsequently Mr. Gould appeared with petitioners before a United States Commissioner and had a conference with the United States Attorney's Office relative to a criminal matter not pertinent here. He did not thereafter represent petitioners (Br. App. 92a-94a). Birnbaum was later summoned to give evidence before the grand jury which indicted petitioners. Mr. Gould arranged a time and place for Birnbaum to appear but did not discuss his testimony with him or with any government attorney (Br. App. 95a-96a). He never disclosed to Birnbaum or to any government official any

[3] "Br. App." refers to petitioners' appendix to their brief in the court of appeals in 1964, which contains excerpts from the testimony at the hearing. We are lodging a copy of that appendix with the Clerk of this Court.

confidential information he had received from petitioners (Br. App. 103a). The document from his firm's files which was used at trial was given to the government by another member of the firm (Br. App. 97a-98a).

On direct appeal of their convictions, petitioners asserted that Mr. Gould's alleged conflict of interest in representing both themselves and Birnbaum had impaired their defense. After finding the facts as recited above, the court of appeals rejected the contention, holding that the "conduct of [the attorney] was not improper and that appellants have failed to show that his professional relationship with Birnbaum prejudiced their defense in any manner." *United States* v. *Re*, 336 F. 2d 306, 319 (C.A. 2). Petitioners now argue that their own trial counsel kept them from attending the hearing (Pet. 13), and that their "exclusion" from the hearing violated their rights of confrontation. Petitioners, however, can hardly tax the prosecution with the fact that their own lawyers considered their presence unnecessary or undesirable (*ibid.*) at that hearing on a matter tangential to the criminal case. We point out additionally that the issue of Mr. Gould's alleged conflict of interest was fully argued on direct appeal. The transcript of the *in camera* hearing, which had been ordered sealed by the district judge at trial, had been unsealed for the purposes of the original appeal and was reprinted in petitioners' appendix to their brief in the court of appeals. As Judge Waterman stated in his concurring opinion below, the issue now sought to be raised collaterally "was implicit in the claims made * * *

on the direct appeal" (Pet. App. 25) and hence is not available on collateral attack. See *Stein* v. *United States*, 313 F. 2d 518, 522 (C.A. 9), certiorari denied, 373 U.S. 918; *Glouser* v. *United States*, 296 F. 2d 853 (C.A. 8), certiorari denied, 369 U.S. 825; *Taylor* v. *United States*, 177 F. 2d 194, 195 (C.A. 4).

Since all of petitioners' contentions could be conclusively determined on the "files and records of the case," the district court properly denied the motion without a hearing. 28 U.S.C. 2255.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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